

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-1255

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

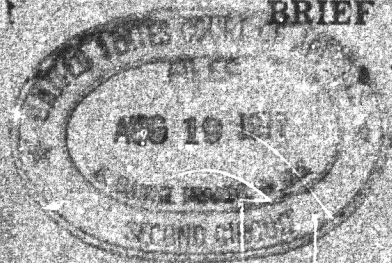
UNITED STATES OF AMERICA,
Plaintiff-Appellee.

v.

IRVIN V. IVERSEN,
Defendant-Appellant.

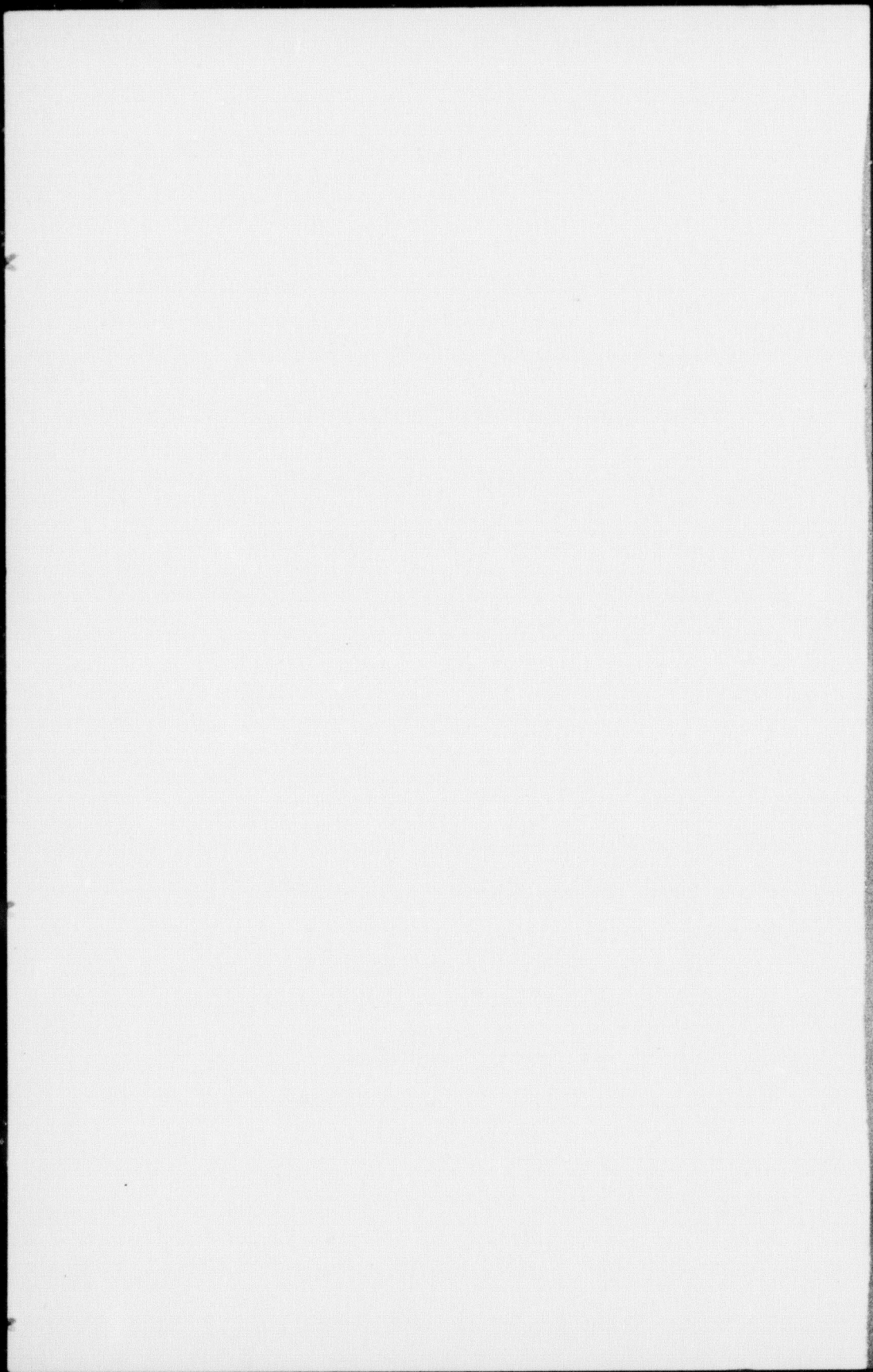
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEE



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IN THE
United States Court of Appeals

For the Second Circuit

Docket No. 77-1255

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

IRVIN V. IVERSEN,
Defendant-Appellant.

BRIEF FOR APPELLEE

Preliminary Statement

On April 26, 1976, a three-count Information was filed against the defendant, Irvin V. Iversen for violation of Title 26, U.S.C., Section 7203 for failure to file income tax returns. Count I charges failure to file for the calendar year 1970, Count II 1971, and Count III charges failure to file for the calendar year 1972. On December 15, 1976, a Judgment of Conviction was entered against the defendant after a jury trial before the Honorable John T. Elfvin, United States District Court Judge for the Western District of New York. On February 28, 1977, the defendant was sentenced for a period of 90 days on each count to run concurrent. It is pursuant to that Judgment of Conviction that the defendant has taken this appeal.

Statement of Facts

Although the Government takes issues with some of the assertions set forth in appellant's Statement of Facts, and also wishes to supplement that Statement of Facts, this will be done in the main text of the brief under the appropriate arguments.

POINT I

There was sufficient evidence to support the jury's finding that defendant's failure to file was wilful beyond a reasonable doubt.

Defendant maintains that the evidence was insufficient as a matter of law to support the jury's finding that his failure to file was wilful beyond a reasonable doubt.

The standard to be applied in deciding this issue is whether, viewing the evidence and all inferences reasonably drawn therefrom in the light most favorable to the Government a reasonable juror could have fairly concluded that defendant's failure was wilful beyond a reasonable doubt. *United States vs. Fahey*, 510 F.2d 302, 305 (2nd Cir. 1974); *United States vs. Brawer*, 482 F.2d 117, at 125 and 127 (2nd Cir. 1973), *cert. denied*, 419 U.S. 1051 (1974); *United States vs. Slutsky*, 487 F.2d 832, 835 (2nd Cir. 1973), *cert. denied*, 416 U.S. 937, *reh. den.*, 416 U.S. 1000 (1973).

The Supreme Court recently considered the meaning of "wilfulness" in *United States vs. Pomponio*, 429 U.S. 10 (1976), *reh. den.* In *Pomponio*, the Court reasserted its position that wilfulness simply means a voluntary, intentional violation of a known legal duty; *bad purpose or evil motive is not required* (Emphasis Added). The Court also attempted to clear up any

misunderstanding resulting from its decision in an earlier case on wilfulness. *United States vs. Bishop*, 412 U.S. 346 (1973). In *Bishop*, the Court had stated:

The Court, in fact, has recognized that the word "wilfully" in these statutes generally connotes a voluntary, intentional violation of a known legal duty. It has formulated the requirement of wilfulness as "bad faith or even intent". *United States vs. Murdock*, 290 U.S. 389, 398, or "evil motive and want of justification in view of all the financial circumstances of the taxpayer." *Spies vs. United States*, 317 U.S. 492, 498 (1943) . . .

The Court's references in *Bishop* to "bad faith" and "evil motive" were apparently misunderstood by many to modify the Court's explanation of wilfulness as a voluntary intention violation of the known legal duty. In *Pomponio*, the Court unequivocally laid this misconception to rest.

With respect to the time at which the wilful state of mind must be found to have existed, this Court held in *United States vs. Pelose*, 538 F.2d 41 (2nd Cir. 1976), that the Government is not required to prove that the defendant had the requisite wilful intent on those dates on which his income tax returns were due. The Government may instead show that between the times that the returns were due and the times they were actually filed, the defendant's failure to file was wilful. *Id.*

In view of *United States vs. Pomponio* and *United States vs. Pelose*, the defendant's unsupported assertion that in order to find him guilty of wilful failure to file, "one would have to say that he [defendant] set out in 1966 on a course of conduct designed to prevent his compliance with the income tax laws" (Page 13 of Appellant's Brief) is incorrect with respect to both the meaning of the term "wilfulness" and the time at which wilfulness must be found to have existed.

It is important to realize that wilfulness, being a state of mind, is rarely susceptible of direct proof. It must generally be inferred from the defendant's acts. Cf. *United States vs. Magnus*, 365 F.2d 1007 (2nd Cir. 1966), *cert. denied*, 386 U.S. 909, *reh. den.* 386 U.S. 78 (1966); *United States vs. Spinelli*, 443 F.2d 2 (9th Cir. 1971); *United States vs. Ramsdell*, 450 F.2d 130 (10th Cir. 1971); *Paschen vs. United States*, 70 F.2d 491 (7th Cir. 1934). This Court has explicitly held that circumstantial evidence alone is sufficient to allow the question of wilfulness to go to the jury. *United States vs. Nathan*, 536 F.2d 988 (2nd Cir. 1976), *cert. denied*, U.S. (19...).

Viewing the evidence presented in this case in the light most favorable to the Government, it is clear that the jury could quite properly infer wilfulness from defendant's conduct, described below.

Defendant was first contacted regarding his income tax delinquency on April 27, 1973 by a Revenue Agent (Government's Exhibit 1(b)). At that time, the defendant had failed to file a federal income tax return for seven consecutive years, 1966, 1967, 1968, 1969, 1970, 1971 and 1972 (158-162). He had also not filed any state income tax returns for those years (353). Where, as here, defendant had knowledge of his obligation to file income tax returns (380), his failure to do so for such an extended period of time is itself suggestive though not dispositive of wilfulness. *United States vs. Magnus*, 365 F.2d 1007, 1011 (2nd Cir. 1966); *United States vs. Hawk*, 497 F.2d 365, 370 (9th Cir. 1974), *cert. denied*, 419 U.S. 838 (1974); *United States vs. Palermo*, 259 F.2d 872, 881 (3rd Cir. 1958); Cf. *United States vs. Holland*, 348 U.S. 121, 139 (1954).

With the exception of the calendar year, 1967, the defendant had filed federal returns for all of these years by the time of his trial in December of 1976. The circumstances

surrounding the actual filing of these returns also show that the defendant's failure to file prior to that time was wilful.

On April 4, 1974, the defendant was contacted by a Special Agent of the I.R.S. and first informed that he was being investigated for failure to file his tax returns (Tr. 30, 31). At that time, he had not filed his 1966, 1967, 1968, 1969, 1970, 1971 or 1972 federal or state tax returns.

Although all returns were eventually filed, the pattern of the filing of these returns indicated to the jury that he originally only filed those returns to which he was subjected to criminal prosecution. The balance of the returns were filed only on the eve of trial when the defendant knew his filing history would be put before a jury on the issue of wilfulness for non-filing his 1970, 1971 and 1972 returns. The defendant's filing history was an apparent case of after-the-fact window dressing and not because the defendant "always intended to file" as he claimed.

The statute of limitations for Section 7203 is six years (Title 26 U.S.C. § 6531) from the date the return is due which was developed by defense counsel in the cross examination of Special Agent Gagliardi (Tr. 125). Thus, the statute of limitations on the 1966 and 1967 returns ran on April 15, 1973 and April 15, 1974, respectively. When Agent Gagliardi informed the defendant on April 4, 1974 of the criminal investigation into the defendant's tax delinquency, the defendant was virtually immune from prosecution on the 1966 and 1967 returns. He was, however, subject to criminal prosecution for the subsequent years.

Defendant's federal returns for 1968 and 1969 were received by the I.R.S. on June 14, 1974 (Tr. 38); his returns for 1970 and 1971 were received on July 16, 1974 (Tr. 48) and

his returns for 1972 was received on October 16, 1974 (Tr. 50-51). Thus, while these returns were anywhere from two to five years late, they were received only two to six months after the defendant was informed on April 4, 1974 by Special Agent Gagliardi that the I.R.S. was investigating the possibility of criminal violations by the defendant (Tr. 30, 31).

The defendant's 1966 return was not filed until September 9, 1976 (Tr. 259)—two years after the other returns were filed. It is also significant in this regard that the trial of this action was originally scheduled for October of 1976 but was adjourned (Tr. 211). The 1967 return was being prepared at the time of the trial (Tr. 318).

The defendant's state tax returns for 1966 through 1972 were not filed until after the trial began (Tr. 427). Again it was the defendant's contention that he had also "always intended to file" his state tax returns (Tr. 426).

When asked to explain the two-year delay in filing the 1966 and 1967 returns, Mr. Gordon, the tax preparer, who was the defendant's brother-in-law, replied somewhat vaguely that it was because the defendant was not sure whether he had already filed returns for these years (Tr. 324). However, the evidence indicated that defendant knew very well that he had never filed returns for those years. He testified that he personally had typed his applications for extension for his 1968 and 1970 returns on which he stated, respectively, "The 1966 and 1967 returns will be filed with my 1968 returns by July 1, 1969", and "My 1966 and 1967, 1968 and 1969 were late for the same reason. These returns will be filed with my 1970 return." (296-297). Therefore, the evidence strongly indicates that the defendant had Mr. Gordon prepare and file returns for those years for which he was still subject to criminal prosecution, *i.e.* 1968 thru 1972, but deliberately failed to file

his other returns until it served some purpose to him other than fulfilling his legal duties.

Accordingly, the jury had this evidence in front of it from which it could find that the defendant's non-filing of returns was wilful until such time as the defendant was threatened with criminal prosecution.

Even if the jury believed that defendant had always intended to file his returns, it is well established that the intent to report income and pay the tax sometime in the future does not vitiate the wilfulness required under Section 7203. *Sansone vs. United States*, 380 U.S. 343, 354 (1965). In *Spies vs. United States*, 317 U.S. 492 (1943), the Court stated:

Punctuality is important to the fiscal system, and these are sanctions [referring to the predecessor of Section 7203] to insure punctual as well as faithful performance of these duties. *Id.* at 496.

The defendant testified at trial that one of his reasons for not filing timely returns was that the partnership returns for Morris, Greenan and Iversen which the defendant needed in order to prepare his personal return were always late (403).

The defendant had given this same reason in his application for extensions to file his 1968 and 1970 return (45, 46), and in a letter addressed to Agent Augustino dated May 1, 1973 (Government's Exhibit 1(b) read to jury at Tr. 26, 27). However, the dates on which the 1970, 1971 and 1972 U.S. Partnership Returns of Income for Morris, Greenan and Iversen were filed, and the dates on which the 1970 and 1971 Individual Income Tax Returns for Jack and Barbara Morris and for Gerald and Eleanor Greenan were filed, strongly suggest that the partnership information was available to the defendant long before he filed his returns for those years.

A chronology of the filing dates of the partnership returns, Iversen's returns and the other partners returns is as follows:

DATES RETURNS ACTUALLY FILED

<i>Return Years</i>	<i>Morris, Greenan, Iversen Partnership Return</i>	<i>Greenan Individual Return</i>	<i>Morris Individual Return</i>	<i>Iversen Individual Return</i>
1970	May 15, 1971 (Tr. 173)	October 18, 1971 (Tr. 190)	July 19, 1971 (Tr. 190)	July 16, 1974 (Tr. 48)
1971	June 15, 1972 (Tr. 174-177)	June 19, 1972 (Tr. 190)	August 28, 1972 (Tr. 190)	July 16, 1974 (Tr. 48)
1972	July 15, 1973 (Tr. 177-178)	Not in Evidence	Not in Evidence	October 16, 1974 (Tr. 50-51)

Thus, while all these returns were filed after April 15th, they were nonetheless filed years earlier than defendant's returns. From this, the jury could quite properly infer that defendant was not being truthful when he claimed that he was awaiting receipt of certain partnership information in order to file his individual returns.

This inference is further supported by a comparison of the defendant's net earnings from the partnership with his gross income for each year. According to the defendant's return filed for 1970, his gross income for that year was \$57,856.82. His net earnings from the partnership for that year were only \$570.88 (Government's Exhibit 38; applicable portions reproduced in Government's Appendix at A-1 and A-2). Therefore, defendant's earnings from the partnership amounted to only one percent of his gross income for that year. Similarly, his net earnings from the partnership in 1972 were \$297.08, or only one third of one percent of his gross income of \$88,531.70 for that year (Government's Exhibit 40; A-3 and A-4). In 1971, the defendant's gross income was

\$71,182.79 (Government's Exhibit 39), but defendant's net earnings from the partnership shows a loss of \$225.47 (Government's Exhibit 39; A-5 and A-6). It is simply a matter of credibility that defendant held up his returns for several years over a few hundred dollars in income which the jury could properly choose not to believe.

Finally, there is evidence that the defendant deliberately misled the Internal Revenue Service about the whereabouts of his records on certain dates, apparently in an effort to keep these records from the I.R.S. while still appearing to cooperate with them.

Defendant has raised the matter of his cooperation with the I.R.S. in his appeal (Pages 9 and 15 of Brief). The Government discusses the following evidence both to discredit defendant's assertions of cooperativeness as well as to show wilfulness.

Defendant testified that he took his records to his ex-wife's house in Hancock, New York sometime after his daughter ceased working for him around March or April of 1973, and that his records remained there until they were delivered to John Gordon in March or April of 1974 (Pages 381 thru 382). However, in a letter written by the defendant to Agent Augustino dated May 1, 1973, the defendant stated: "You stopped at my office on April 27th, while I was on trial, in reference to my 1970, 1971 and 1972 income tax returns. I had spoke with one of your men in this regard last month. I advised him that these were in the hands of my accountant, who had a problem preparing them because of a previous partnership return." (Government's Exhibit 1(b) read to jury: Tr. 26, 27).

At trial, the defendant was unable to convincingly explain this apparent inconsistency (Pages 382 thru 384).

This inconsistency is further compounded by the fact that the defendant testified that the accountant he gave them to was Henry Schroeder (Tr. 383). The partnership returns were prepared by Henry Schroeder (Government Exhibits 42, 45 and 48; reproduced in appropriate part in Government's Appendix A-7, A-8, A-9). That if these returns were in the hands of Mr. Schroeder as the defendant claims, there should have been no problem getting the information from the partnership returns, also as the defendant claims. Mr. Schroeder was unavailable to testify at trial because he is deceased (Tr. 425).

Therefore, it was perfectly reasonable for the jury to infer that the defendant had deliberately mislead the Revenue Agent about the whereabouts of his records in order to maintain a pretense of cooperation.

Again, the jury in judging the defendant's credibility had another reason to disbelieve the defendant's claim that he always intended to file.

On appeal, defendant argues that certain actions which he allegedly undertook prior to being contacted by I.R.S. about his returns demonstrate that his failure to file timely returns was not wilful.

It should be noted in this context that in the defendant's analysis of the evidence he treats evidence *in the light most favorable to the defendant*, which is clearly erroneous.

First, defendant points to the evidence that before being contacted by the I.R.S. he spoke with two certified public accountants about doing his returns. One of these accountants, Mr. Howard R. Wilson, testified that he "seems to recall" that on two occasions, once in 1971 and once in 1972 the defendant indicated to him that he had not filed his returns and had to get them filed (247). On both occasions, the

primary purpose for the meeting was to give Wilson materials so that Wilson could prepare returns for some of defendant's clients (247). The meetings were not for the purpose of getting the defendant's own tax returns done (Tr. 253). As the defendant was leaving, he casually mentioned to Wilson that his own returns had not been done (Tr. 253).

Wilson then went on to testify (Tr. 253):

Q. He casually mentioned his own returns had not been filed?

A. Yes.

Q. What did you say in response to that, to the best of your recollection?

A. I believe he said that he had to get the material together, but he knew I was busy, and I said that, you know, *he shouldn't let that worry him, he should get it together and we would expedite it, try to get it out.* (Emphasis Added).

The defendant *never* contacted Wilson again (Tr. 253, 254).

At best, this contact with Wilson only shows an acknowledgement on the defendant's part of his legal obligation, and a non-chalant attitude toward it. He had the necessary help to prepare his delinquent returns readily available to him, but yet ignored it and did nothing.

The other accountant to whom the defendant allegedly spoke about his returns was Mr. Henry Schroeder (Tr. 306 and 307). As noted earlier in this argument, there was a discrepancy in the evidence as to whether the defendant in fact had contacted Mr. Schroeder. It is again noted that Mr. Schroeder was deceased and thus unavailable at trial.

Next, defendant points to the fact that in June of 1971 he hired his daughter, Paula, to help put his records in order (Tr. 236, 245). She testified that she had just graduated from

high school (Tr. 333) and had never taken any bookkeeping or secretarial courses and knew nothing about filing tax returns (Tr. 345). Her other duties included getting coffee, taking her father's clothes to the cleaner, filing papers downtown and serving summonses (Tr. 345). She was what is called a "gopher" (Tr. 345). She also testified that she could only work on the records when her father was out of the office for extended periods of time such as two or three days because she had to use his desk and it took a long time to spread everything out (Tr. 338).

Paula left her father's employ on January 1, 1972 and subsequently returned to work around May of 1972 (Tr. 339). Defendant apparently made no effort to hire a replacement for his daughter during her six-month absence. Furthermore, from the time Paula returned to work until she left her father's employ for the final time in April or May of 1973, Paula was also spending eight hours a day managing a horse farm and attending college full time—all this in addition to working for her father (Tr. 346-350).

There was also testimony that when a bookkeeper looked at the defendant's records to do payroll tax returns in October of 1973, supposedly after defendant's daughter worked on them, *they looked untouched and there was no indication that anybody had done any work on them.* (Tr. 439).

These details of defendant's daughter's employment demonstrate how far short the defendant's efforts fell of the efforts one would reasonably expect from a man sincerely attempting to get his delinquent tax returns filed. It is submitted to this Court, as it was to the jury during the Government's summation (Tr. 473), that the defendant was merely keeping his daughter busy so she could earn her allowance and not making any real attempt to fulfill his tax filing obligations.

The defendant argues that the completed, signed and dated but *unfiled* tax returns for the years 1969, 1970 and 1971 are further proof that defendant's failure to file was not wilful. However, these returns only raise more questions about the defendant's credibility.

All the returns bear the signature of the defendant and his then-wife, Esther J. Iversen (Tr. 84). The one for 1969 is dated April 10, 1970. (Government's Exhibit 27); the one for 1970 is dated April 12, 1971 (Government's Exhibit 31); and the one for 1971 is dated April 16, 1972 (Government's Exhibit 32). Defendant first testified that he prepared all three returns on April 15, 1972, but had antedated the 1969 and 1970 returns April 10, 1970 and April 12, 1971, respectively, because he thought those were the dates that should be on them (Tr. 286). When asked on cross-examination whether he intentionally misdated these returns, he then changed his story and testified that he and his wife had signed and dated blank returns on those dates appearing on the returns and that he subsequently completed these returns on April 14 and 15, 1972 (Tr. 396).

In his brief the defendant states, "It was only because he believed them [these unfiled returns] to be inaccurate, a fact later confirmed by the I.R.S., that he did not file them (Page 15 of Defendant's Brief). All that the I.R.S. has confirmed is that the gross-adjusted income which was reported on these unfiled returns for 1969, 1970 and 1971 differs from that reported on the returns eventually filed for those years (Tr. 288 thru 291). The fact that the defendant apparently made no effort to correct these alleged inaccuracies makes it more likely that he did not file these returns because together they showed a tax owing of close of \$20,000.00 (Tr. 288 thru 291).

Defendant also relies upon the testimony of his secretary, Margaret Hopkins, that she "nagged the defendant a lot about

getting his returns filed and that they tried to set some time to work on it and it never seemed to materialize" (Tr. 217). Like the evidence of the defendant's employment of his daughter, this testimony is certainly not suggestive of a meaningful effort on defendant's part to get his returns filed. In fact, it is indicative of defendant's wilfulness in failing to file. He was being constantly reminded that he didn't file and still did not do it.

Defendant also urges that lack of wilfulness is shown by his testimony that before being contacted by the I.R.S. regarding his tax returns, he voluntarily disclosed to an I.R.S. Agent who was assisting him with the forms for his employee withholding taxes that he had not filed his personal income tax returns for several years. These words were not followed up with action. At most, the defendant's statement to the agent suggests that the defendant did not hope to permanently escape payment of his taxes. However, in a prosecution for wilfully failing to file tax returns, it is not necessary for the Government to prove that the individual intended or attempted to conceal income or evade payment of taxes. *United States vs. Plate*, 435 F.2d 789 (2nd Cir. 1970).

Defendant has been characterized as extremely busy¹ and ignorant of the most basic principles of bookkeeping. Knowing this about himself, the defendant had a duty to obtain the services of an accountant to get his returns prepared. There are many busy people who are not capable of preparing their own returns who do get their tax returns filed each year by hiring tax preparers. Defendant was clearly aware of this practice because he did this on behalf of some of his clients (Tr. 247).

¹ The defendant, however, was not too busy to take a vacation to Florida in 1971, a vacation to Jamaica in 1972, and a vacation to New Zealand and Australia in 1973 (Tr. 401, 402).

The defendant also points to the fact that he hired a Patricia Kline who was hired to set up the bookkeeping system and gather the information necessary to file the delinquent returns. Kline when called by the Government as a rebuttal witness and testified that she was hired solely for the purpose of straightening out the defendant's payroll tax returns (Tr. 437 and 438); that she worked in her own home and at her own convenience (Tr. 434); and that after she began working for the defendant her duties were expanded to include straightening out the checking account and cash disbursements (Tr. 437). However, she was never informed that Iversen had not filed personal income tax returns (Tr. 449). From the fact that Patricia Kline was never told that the defendant had not filed personal tax returns, it would be easy for a jury to infer that she was not hired by Iversen for the purpose of getting his delinquent returns filed.

The defendant also states that Iversen was always cooperative and truthful when dealing with the Internal Revenue Agents. Special Agent Gagliardi testified that the defendant had been untruthful to him when the defendant told him that he was living day-to-day and hand-to-mouth existence and that he should file bankruptcy. He then found out shortly after that he bought \$2,000.00 worth of stock (Tr. 155). Special Agent Gagliardi also testified that he thought the defendant had been untruthful with him when he said he was too busy to file his returns due to the fact that the defendant had filed out returns but had subsequently found returns that were prepared and signed but unfiled (Tr. 154 and 155).

Although the defendant put in quite an extensive case to show that his non-filing was not wilful, there were many discrepancies in that case as noted above and a jury could rightfully discount much of the evidence presented by the defense.

In determining the issue of wilfulness, the jury could properly find the defendant's actions spoke louder than his words.

Accordingly, taking the evidence in the light most favorable to the Government, there was sufficient evidence in front of the jury to find that the defendant's non-failure was wilful and accordingly, this conviction should not be set aside on this ground.

POINT II

The trial Court's instructions to the jury on the question of wilfulness were clear and in accordance with the law.

Defendant contends that the trial Court erroneously charged the jury with respect to its consideration of defendant's negligence in determining wilfulness. This contention is totally without merit. The Court's instructions were both clear and in accordance with the law.

In order to put this argument in its proper perspective it is necessary to understand where the element of negligence fit in this case.

The defendant contends that because he was so busy, he did not put his records (cancelled checks, paid bills, etc.) in any discernible order. That this continued on for years, and due to the volume of unorganized materials, he could not reasonably organize these materials in order to gather the necessary information to prepare his returns. There is no claim that the material was not available to him to organize, only that he did not take the time to organize it or hire competent help to do so. It is this lack of organization which is the basis for the negligence charge by the Court.

In this regard, the defendant states, "Such negligence was based neither on intention nor deliberation; but rather on his inability to use proper care and devote sufficient attention to financial matters. This situation is best characterized as one of impossibility." (Page 22, Defendant's Brief). At this point, it is interesting to note that when this case turned into a criminal investigation, the defendant was very expeditious in getting his records in order and getting his return filed which was a situation other than one of "impossibility."

Wilfulness under Section 7203 is a voluntary, intentional violation of a known legal duty. *U.S. vs. Pomponio*, 429 U.S. 10 (1976), U.S. reh. den.; *U.S. vs. Bishop*, 412 U.S. 346 (1973); *Spies vs. U.S.*, 317 U.S. 492 (1943). The trial Court explained the term "wilfulness" six times in the course of its instructions, and each time stated that the term means "voluntarily, deliberately and intentionally, as distinguished from accidentally, inadvertently or negligently." (Appendix Pages A-16, A-17, A-18, A-19, A-45, A-46, and A-48) (Emphasis Added). This Court has specifically approved an instruction which defined "wilful failure" as "a conscious, deliberate, purposeful failure, as opposed to an unconscious, unwilling, negligent or mistaken failure." *U.S. vs. Platt*, 435 F.2d 789 (2nd Cir. 1970). The Court's instruction on the meaning of "wilfulness" in this case is essentially identical to that given in *Platt*. Thus, this part of the Court's instruction was clearly correct, and defendant concedes this (Page 18 of Defendant's Brief).

Defendant asserts, however, that the Court's specific charge with respect to the jury's consideration of defendant's negligent bookkeeping was incorrect. That charge was as follows:

Now, I must hedge somewhat on my reference to negligence. Negligence per se is no defense. The man

must be found to have been acting voluntarily and wilfully and intentionally, but if he were negligent, as the proof might show in this case, in keeping proper books or keeping a proper organization of books, it yet seems that to be negligence, that area or type of negligence would not be sufficient to negate the wilfulness and intention that the law requires for criminality (A-17).

The following day, in response to a request from the jury, the Court essentially repeated this instruction:

The Government had to establish beyond a reasonable doubt that the failure to file tax returns on or before the dates they were due for the years in question was done willfully and knowingly. I talked about willfulness, saying willfulness is an essential element of the offense, and it means voluntarily, purposely, deliberately, and intentionally, as distinguished from accidentally, inadvertently or negligently. If he failed to file out of mere negligence that would not constitute willfulness. I said in that connection, of course, that one who is expected to file a tax return would be expected to know what his income is and have some methodology, some means of making the return, so that he had intentionally not kept his books or had failed to keep his books, knowing they were not properly kept, and this did not enable him to prepare a return, this would not keep the failure to file from being willful and knowing and intentional. I said the failure to make a timely return is willful if the defendant's failure to act was voluntary or purposeful and with the specific intent to violate a known legal duty (A-45, A-46).

In support of his assertion that the above instructions were incorrect, defendant makes two arguments. First, he argues that they wrongly implied the correlative idea that negligent bookkeeping itself could be the source of criminal behavior under Section 7203 (Page 20 of Defendant's Brief). Second, he argues (without support) that negligent bookkeeping "may

serve to negate 'wilfulness' entirely." (Page 23 of Defendant's Brief). Both of these arguments fail for the reasons discussed below.

At the outset, it should be made clear that the Government fully agrees that the wilfulness requirement of Section 7203 could not be satisfied by a finding that the defendant was negligent in his bookkeeping. *U.S. vs. Pomponio, supra*; *U.S. vs. Bishop, supra*; *U.S. vs. Murdock*, 290 U.S. 389 (1933). However, the Government does not agree that the Court's instructions implied that it could. Even taken out of context, the statements "negligent bookkeeping is not sufficient to negate a finding of wilfulness" and "this [negligent bookkeeping] would not keep the failure to file from being wilful and knowing and intentional" do not reasonably imply that negligent bookkeeping could constitute wilfulness. Furthermore, the Court specifically instructed the jury on two occasions that mere negligence or even gross negligence could not constitute wilfulness (A-16 and A-45).

The Court's instruction was, in effect, that they must first find defendant's failure to file was wilful, and if they did make this finding, negligent bookkeeping would not in and of itself serve to negate the wilfulness. The defendant incorrectly interprets the Court's instructions as being that if the jury finds the failure to file was exclusively the result of negligent bookkeeping then that would constitute wilfulness. That was not at all what the Court charged.

It is also significant that the jury deliberated for approximately nine hours. Since the only element of the offense in issue was wilfulness (Tr. 380), it could hardly be said, as defendant does, that the effect of the above-quoted instructions was to "effectively direct a verdict of guilty." (Page 19 of Defendant's Brief).

The case of *U.S. vs. Bengimina*, 499 F.2d 117 (8th Cir. 1974), which defendant cites in support of his "implication" argument is easily distinguished from the case at hand. In *Bengimina*, the Eighth Circuit held impermissible an instruction under Section 7203 that "defendant's conduct is wilful if he acted through a careless or reckless disregard of the law." In the case at hand, there was no such instruction. Indeed, as mentioned earlier, the jury was twice instructed that negligence is not sufficient to establish wilfulness.

With respect to defendant's second argument, there does not appear to be any cases dealing with the question of whether negligent bookkeeping may be sufficient to negate wilfulness under Section 7203. However, the nature of the offense itself indicates that the trial Court was correct in instructing that it would not be sufficient.

Section 7203 criminalizes the wilful failure to file income tax returns. In order for people to prepare their returns, it is ordinarily necessary for them to maintain certain records. If a negligent failure to maintain the necessary records were held to be sufficient to negate the required wilfulness under Section 7203, most people would simply become very lax in keeping these records. In so doing, they would actually be protecting themselves against prosecution under the statute. This is obviously an absurd result, and any construction of the statute which would lead to such a result should be rejected by this Court. *Helvering vs. Hammel*, 311 U.S. 504 (1941); *Northern Am. Utilities Securities Corp. vs. Posen*, 176 F.2d 194 (2nd Cir. 1949).

Defendant cites the case of *U.S. vs. Berg*, 75-1 U.S.C.T. 9198 (D.S.D. 1974) in support of his contention that a finding of negligence might negate wilfulness. Berg had failed to file a tax return for three years. Completed returns for all three

years were subsequently found; one under the floor mat of defendant's car, one in a wicker basket belonging to defendant's mother-in-law and one scattered among his papers. Based on this and other evidence of the defendant's extreme negligence with respect to paperwork, the Court held that the Government had failed to establish wilfulness. In a sense negligence did negate wilfulness in *Berg*. However, this was only because the Court concluded on the basis of the evidence of defendant's negligence that defendant was *unaware* that he had not mailed his returns. In the present case, the defendant Iversen fully admits that he was always aware that he had not filed his returns (Tr. 380).

Finally, defendant argues that the fact that the jury requested further instructions on the concept of wilfulness during the second day of deliberation shows that the instructions were confusing and possibly misunderstood by the jury.

It is by no means unusual for a jury to request further instructions. Nor did the jury's request necessarily indicate that the Trial Court's initial instructions were confusing. Approximately 20 hours had passed since the Court charged the jury on the previous day, and it is entirely possible that the jury simply needed to have their recollection of the law refreshed. After the Judge answered the jury's questions, the jury foreman canvassed all the jurors to see whether there was any further question about the concepts just explained by the Judge, including the concept of wilfulness, and apparently there was not (Tr. 571). In addition, it would be a serious mistake for this Court to view the jury's request for further instruction as a negative reflection on their ultimate verdict. Rather, it is a credit to the jury that they exercised their right to request further instruction rather than deliberate when they had some question as to their understanding of the law.

Accordingly, the defendant's conviction should not be set aside on the basis of the Court's instructions to the jury.

POINT III

Defendant's three month prison sentence should be upheld.

(A). Defendant's three month prison sentence is not subject to Appellate Review.

Defendant was sentenced on each count to the custody of the Attorney General for a period of 90 days, those sentences to run concurrently and was not fined (Page 12 of Sentencing Transcript). The statute provides for a maximum sentence of one year imprisonment or a \$10,000.00 fine, or both, on each count. Therefore, the sentence imposed was well within the maximum statutory limits of up to three years incarceration and a \$30,000.00 fine.

It is firmly established that an Appellate Court has no power to review a sentence which is within the limitations set forth in the statute. *Dorszynski vs. U.S.*, 418 U.S. 424, 440-441 (1974); *U.S. vs. Ticker*, 404 U.S. 443, 447 (1972); *Gore vs. U.S.*, 357 U.S. 386, 393 (1958); *U.S. vs. Stein*, 544 F.2d 96, 101 (2nd Cir. 1976); *U.S. vs. Seijo*, 537 F.2d 694, 700 (2nd Cir. 1976), U.S., cert. denied; *U.S. vs. Brown*, 379 F.2d 1170, 1172 (2nd Cir. 1973). From the above citation, it should be obvious that this rule has been explicitly adopted by the Second Circuit on numerous occasions, defendant's citation to a 15 year old, very general, normative survey of then-Second Circuit judges notwithstanding.

(B). The sentence is not excessive.

Defendant's three month prison sentence is clearly not excessive. Firstly, it is only one-twelfth of the statutory maximum sentence the defendant could have received. Secondly, there was very strong evidence of wilfulness in this case (See Point I) and it would have been entirely proper for the Trial Court to consider this evidence in imposing sentence.² *United States vs. Egan*, 459 F.2d 997, 998 (2nd Cir. 1972), *cert. denied*, 409 U.S. 875 (1972); *U.S. vs. Sweig*, 454 F.2d 181, 183-184 (2nd Cir. 1972); *U.S. vs. Doyle*, 438 F.2d 715, 721 (2nd Cir. 1965), *cert. denied*, 382 U.S. 843 (1965). Thirdly, at least five circuits have specifically upheld sentences under Section 7203 more severe than the sentence in this case. *U.S. vs. Goldman* 372 F.2d 263 (34d Cir. 1965) (90 days imprisonment and \$500.00 fine for one count); *U.S. vs. Overton*, 359 F.2d 28 (4th Cir. 1966) (\$5,000.00 fine and one year imprisonment, with suspension of nine months thereof upon payment of fine and cost within 30 days, for three counts); *U.S. vs. Ming*, 466 F.2d 1000 (7th Cir. 1972), *cert. den.*, 409 U.S. 915 (1972), *reh. den.*, 409 U.S. 1051 (1972) (four months imprisonment plus \$1,250.00 fine on each of four counts, sentences to run consecutively for a total of 16 months); *U.S. vs. MacLeod*, 436 F.2d 947 (8th Cir. 1971), *cert. den.*, 402 U.S. 907 (1971), *reh. den.*, 402 U.S. 990 (1971) (one year imprisonment and \$10,000.00 fine on first count and 5 years probation on second and third count); *Cooley vs. U.S.*, 501 F.2d 1249 (9th Cir. 1974), *cert. denied*, 419 U.S. 1123 (1974) (one year imprisonment and \$2,000.00 fine on each of three counts).

² It should be noted that Judge Elfvin made it very clear in sentencing the defendant that he was not influenced by the fact that the defendant had been disbarred by the Appellate Division for misuse of clients' funds (Pages 8 and 9 of Sentencing Transcript). The fact that the defendant has been disbarred as the result of an unrelated matter operates to make the defendant's sentence less severe in that the Court's sentence does not affect the defendant's professional status.

(C). The fact that few persons convicted under section 7203 in this district have been sentenced to prison does not invalidate the sentence in this case.

At the time of defendant's sentencing, only one other person had been sentenced to prison under Section 7203 in the Western District of New York during the past five years.³ However, if that fact were to invalidate the sentence in the present case, then by the same reasoning no defendant in this district could ever be sentenced to imprisonment under Section 7203. The effect would be to nullify the sentencing provision of Section 7203 specifically provided for by Congress. Such a result would clearly be at odds with our tripartite form of government.

For all of these reasons, defendant's sentence of three months imprisonment should be upheld.

³ Two observations are in order. First, since the defendant was sentenced on February 28, 1977, a third person has also been sentenced to prison under Section 7203. That person was also sentenced by Judge Elfvin to a 30-day sentence on a plea. *U.S. vs. DoBucki*, CR 76-159. DoBucki was a hard-working businessman with a clean record. Second, the present case was Judge Elfvin's first sentence handed down in a tax case so the fact that only one person has received a sentence of incarceration under Section 7203 prior to the defendant's in the Western District of New York is of little significance.

Conclusion

For all of the above-cited arguments, the defendant's conviction and sentence should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

Re: U. S. A. vs.
Irvin V. Iversen
No. 77-1255

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
Company, Batavia, New York.

On the 17th day of August, 19 77
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the above case, in a sealed, postpaid wrapper, to:

10 Copies of each to A. Daniel Fusaro, Clerk,
U. S. Court of Appeals-Second Circuit
New Federal Court House
Foley Square, New York, N.Y. 10007

2 Copies of each to Diebold, Birmingham, Gorman
& Brown, 1340 Statler Hilton Hotel
Buffalo, New York 14202
Att: Michael J. Brown

at the First Class Post Office in Batavia, New
York. The package was mailed Special Delivery at
about 4:00 P.M. on said date at the request of:

Richard J. Arcara, U. S. Attorney, 502 U. S. Court House,
Buffalo, N.Y. 14202, Att: Richard E. Mellenger, Asst. U. S. Atty.

Leslie R. Johnson

Sworn to before me this

17th day of August, 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1978.

